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Supreme Court, U.S.
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IN THE

UNITED STATES SUPREME COURT

Phillip Ernest Anselmo,
Petitioner

v.

The People of the State of Colorado
And the City of Aurora,

Municipal Case # 98-43088
District Case # 99-CR-1304

ON PETITION FOR WRIT OF CERTIORI TO THE
Municipal Court of Aurora

PETITION for WRIT of CERTIORARI

Presented by:
Phillip Ernest Anselmo
926 Grove Street, Suite 10
S.F., CA 94117
(415) 771-0500

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QUESTIONS PRESENTED FOR REVIEW

A. May one waive the right to a jury trial through in-action?

B. May one be denied counsel of choice absent prejudice to any party?

C. Does it violate equal protection under the 14th Amendment to treat an in propria persona defendant/attorney special under the law ?

D. If an illegal seizure, detention, and investigation occurs shall evidence of the subsequent conduct and statements be suppressed?

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I. NATURE of ACTION

On April 12, 1999, Petitioner was tried by Aurora, Colorado Municipal Court Judge Stine who disallowed a jury trial despite repeated demands over several months prior to trial, and despite the fact that the case was earlier set for jury trial and a jury fee paid. The lower court also disallowed paid counsel of choice. The criminal trial was for allegedly not paying a three dollar cover charge at a public dance hall (trespass) and refusing to obey an order to not resist arrest when petitioner identified himself when stopped by the police but didn't produce physical identification. Petitioner is a forty- four year old business attorney-at-law who has never been previously arrested. On appeal, on March 10, 2000, the Colorado District Court Judge Hickman left unaltered this conclusion (App. Ex. 4) which was appealed and declined on August 21, 2000 by Writ of Certiori to the Colorado Supreme Court (App. Ex. 1).

II. CIRCUMSTANCES rendering REVIEW NECESSARY and PROPER

The lower courts misconstrue this Supreme Court's decisions by permitting unknowing waiver of the right to trial by jury, refusing a criminal defendant's right to paid counsel of choice and by creating a new class of citizens-- lawyers-- to whom they deny equal protection of the law. These trial court wrongs are likely to be repeated, and due to the nature of the parties, such result, not redressed, affronts Constitutional mandates, abrogates confidence in the Courts and undermines respect for the law. These appealed rulings are in direct conflict with the Federal Court of Appeals, several State Supreme Courts, and direct precedent of this Court.

III. Summary of the wrong law applied.

In the earlier Colorado Supreme Court cases of *Christie* and *Anaya* the Colorado Supreme Court correctly held that no waiver of the right to trial by a jury of peers could occur absent a knowing, full and voluntary wavier following United States Supreme Court precedent of *Barker (see below).* Here however, the lower courts overturned such precedent by failing to redress the errors at the trial court level, thereby directly conflicting with established federal law and the precedents of this Court set out below. Because of the public's perception of lawyers, the courts and the law, it is critical that a new class of individuals, attorneys, are not singled out for differential treatment.

IV. BASIS of JURISDICTION

Review is provided under United States Constitutional Amendments 11 and 14.

V. RELIEF SOUGHT

Petitioner seeks to (1) Reverse court conviction and (2) to Remand and by Writ of mandamus compel trial court to allow defendant a jury trial (3) with counsel of choice (Mitch Baker) and/or (4) suppression of all evidence after the illegal seizure.

VI. STATEMENT OF FACTS

Petitioner is a 44 year old business lawyer who has no previous record. Mr. Anselmo grew up in Denver from a working class family, won an academic scholarship to C.U. Boulder and studied abroad in Great

Britain. After receiving both a B.S. in business (accounting) and a B.A. in political science cum laude, Mr. Anselmo received his juris doctorate from Seattle University after two years of law school. He set up practice in Seattle and then in San Francisco where he currently practices. Although Mr. Anselmo took and passed the bar exam in Colorado in 1981, he had never practiced in Colorado, never had a client here, never appeared in Court there. At the time of this incident, in the Fall of 1998, he taught business college at Mesa State in Montrose, Colorado, where he was moving, RP pgs. 108-109, lns. 10-22; pg. 17, lns. 13-24.

STATEMENT OF PROCEDURAL FACTS

On Sept. 12, 1998, Mr. Anselmo was summoned to answer certain charges stemming from allegations that he refused to pay a $3.00 cover charge at the Stampede Dance Emporium, before the Aurora Municipal Court on October 9, 1998 at 8 a.m. In response, Mr. Anselmo sent a letter on 9-28-98 to the court being not guilty, waiving his right to speedy trial in that regard, and requesting the matter be set for preliminary hearing (even though he didn't know that in Colorado preliminary hearings aren't allowed for matters of this sort). RP pg. 6-9, lns. 17-24.

The preliminary hearing was set for November 25th 1998 at 1:30 p.m. in Division I. This was Mr. Anselmo's first appearance.

Mr. Anselmo demanded trial by jury, Id.

The Court: It does not appear you have perfected your right to a jury, so this will be set for trial to the Court.

The Defendant: I'd like a jury trial, your Honor.

The Court: Well, the problem is under the Municipal Court Rules you had to file a jury demand and post a jury fee within 10 days of the entry of your plea, which you had submitted by mail back in September... .

The Defendant: Can I bring a motion to reinstate the right to the jury?

The Court: You may but, frankly, it would be an exercise in futility. ...
Are you intending to represent yourself or are you going to hire an attorney?

The Defendant: I'll have an attorney. RP 11-25-98, pgs. 3-4, lns. 9-11.

Immediately after this first appearance, Mr. Anselmo paid the $25.00 fee and sent a written demand for a six person jury. Then, on December 3, 1998, Mr. Anselmo also filed and served a motion for a jury trial. The clerk then set the jury trial for 1-19-99, but later unilaterally cancelled the jury trial and reset the matter for court trial on 2-16. Mr. Anselmo then wrote on January 4, 1999, January 29, 1999, and February 19, 1999 demanding a jury trial.

On February 12, 1999, a referred law firm of Dill, Dill and Carr, with whom Mr. Anselmo had never met entered an appearance and requested this matter be continued to allow counsel the opportunity to prepare. This motion was granted. Trial is set for April 12, 1999. Mr. Anselmo then came from out of state (California where he practices business law) and met with Mr. Mitchell Baker and choose him to represent him. A

substitution was filed a couple weeks before trial, and due to counsels' trial conflict in scheduling a new date was requested for the trial. The Court refused citing no reason other than the speedy trial rules, which had already been waived. Other than the police officers who were available there was only one lay witness called by the city, who was also available.

The issues of jury trial and counsel of choice were again brought before the trial judge by pretrial motion:

Mr. Tooley: Mr. Anselmo lives in California. The first time I met him was this weekend. He met with Mitch Baker, an attorney I believe this Court is probably familiar with, who practices criminal law, also and felt very comfortable with Mr. Baker and his philosophical orientation and wanted Mr. Baker to represent him. Mr. Baker and I signed a substitution of counsel, which was filed several weeks ago... . (T)here's no showing of hardship here sufficient to set aside Mr. Anselmo's fundamental right to counsel of choice, so we would ask the Court to reverse that decision as well and to permit him to have Mr. Baker ... , RP 4-12-99 at pg. 11, lns 12-23, (and have a jury trial, pgs. 6-10, lns. 17-3).

The Court: (S)ubstitution of counsel two weeks before the trial date I don't believe good cause has been shown for granting it and it is, again, denied. RP pg. 15, lns. 6-8.

Defendant is entitled to a jury trial in this case and to counsel of his choice according to the precedents set out below.

VII. STATEMENT OF LAW AND ARGUMENT

A. DEFENDANT IS FUNDAMENTALLY ENTITLED TO A JURY TRIAL

In 1992, the Colorado Supreme Court case of *People vs. Christie*, 837 P.2d 1237 (1992), also arising out of the Arapahoe County District Court, in accordance with federal precedents, rejected the "demand-waiver doctrine." See this United States Supreme Court case of *Barker vs. Wing*, 407 U.S. 514, 92 Supreme Court 2182, 33 Lawyers Edition 2d 101 (1972) (noting a discrepancy in the various states 'pay for a jury' doctrine among which Colorado is among those states requiring a fee for a jury demand), *Barker* holds:

(P)resuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v Zerbst*, 304 US 458, 464, 82 L Ed 1461, 1466, 58 S Ct 1019, 146 ALR 357 (1938). Courts should "indulge every reasonable presumption against waiver," *Aetna Ins. Co. v Kennedy*, 301 US 389, 393, 81 L Ed 1177, 1180, 57 S Ct 809 (1937), and they should "not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v Public Utilities Comm'n*, 301 US 292, 307, 81 L Ed 1093, 1103, 57 S Ct 724 (1937); *Carnley v Cochran*, 369 US 506, 8 L Ed 2d 70, 82 S Ct 884 (1962).

In *Christie*, the Colorado Supreme Court had the opportunity to articulate the effect of

municipal court Rule 223 (See App, Ex. 4). The Colorado Court began by recognizing the cherished right to a trial by a jury of ones peers as set out in *Duncan v. Louisiana*, 391 U.S. 145 (1968).

In *Duncan*, this United States Supreme Court held that "the right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction." 391 U.S. at 154 (incorporating the Sixth Amendment's guarantee of the right to a jury trial into the due process clause of the Fourteenth Amendment). Colorado had stated earlier, it does not dispute that the right to a jury trial is a fundamental right. *Curtis*, 681 P.2d at 511 (citing *Duncan), Christie*, Id.

Article II, section 16 of the Colorado Constitution (App, Ex 5) provides that "in criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." The Colorado Constitution also provides that "the right of trial by jury shall remain inviolate in criminal cases. . . ." Colo. Const. art. II, § 23.

Prior to the instant case, Colorado agrees that the right to a jury trial is a fundamental right. *People v. Curtis*, 681 P.2d 504, 511 (Colo. 1984) (citing *Duncan v. Louisiana*, 391 U.S. 145 (1968)); *Rice v. People*, 193 Colo. 270, 271, 565 P.2d 940, 941 (1977). In *Curtis*, Colorado recognized that the waiver of a fundamental right, including the right to a jury trial, must be "voluntary, knowing and intentional." 681 P.2d at 511. In *Rice*, Colorado held that the relinquishment of the right to a jury

trial "must be a matter of certainty and not implication." 193 Colo. at 272, 565 P.2d at 941 (note omitted). *Curtis* also stands for the principle that the right to a jury trial is "inherently personal and basic" and that therefore the waiver of the right can only be by the accused. 681 P.2d at 511. Finally, Colorado said: "courts do not presume acquiescence in the loss of fundamental constitutional rights, and therefore indulge every reasonable presumption against waiver." **Id.** at 514.

Courts must indulge every reasonable presumption against finding a waiver *Johnson v. Zerbst,* 304 U.S. at 464; *United States v. Williamson,* 806 F.2d 216 (10th Cir. 1986); *United States v. Gipson,* 693 F.2d 109 (10th Cir. 1982), **cert. denied,** 459 U.S. 1216, 75 L. Ed. 2d 455, 103 S. Ct. 1218 (1983); *Carnley v. Cochran,* 369 U.S. 506, 8 L. Ed. 2d 70, 82 S. Ct. 884 (1962); *Williamson,* 806 F.2d at 219. Any doubts regarding the waiver must be resolved in defendant's favor. *Williamson,* 806 F.2d at 220" *People v Arguello,* 772 P.2d 87 (Colo., 1989)

Appellate review of the record in this situation must be made "without speculation" in light of the strong presumption against waiver. *Sanchez v. Mondragon,* 858 F.2d 1462, 1467 (10th Cir. 1988), quoting *U.S. V. Padilla,* 819 F.2d at 957. **See also** *Rice v. People,* 193 Colo. 270, 271, 565 P.2d 940, 941 (1977); *People v. Evans,* 44 Colo. App. 288, 612 P.2d 1153, 1155 (1980) (determination of waiver must be "matter of certainty and not implication").

1. DENIAL OF EQUAL PROTECTION

With these principles in mind, it is clear the

trial judge erred in this matter by refusing to allow a jury trial simply because the accused happens to have passed a bar exam 20 years ago. The demand-waiver doctrine does not apply only to certain citizens based upon what they do for a living. The trial court has created a classification based upon occupation. As applied, such classification is not cognizable under the equal protection clause, as it implicates the due process guarantee of the Fourteenth Amendment. The right to a jury trial is a fundamental right in a criminal case, and any statute or rule which, as applied, abridges a fundamental right is subject to strict scrutiny. The differential treatment deprives the defendant of the equal protection of the laws as guaranteed by the federal constitution, *Hardamon*, 178 Colo. at 275-76

2. UNKNOWING INACTION CANNOT WAIVE JURY TRIAL

"In its simplest formulation, the demand-waiver doctrine presumes a waiver of a fundamental right from inaction. The doctrine was described, and rejected as contrary to the right to a speedy trial, by the United States Supreme Court in *Barker v. Wing* , 407 U.S. 514 (1972). Indeed, *Barker* cites (Colorado's) decision in *Hicks v. People*, 148 Colo. 26, 364 P.2d 877 (1961), as one of eight jurisdictions which has rejected the demand-waiver doctrine. 407 U.S. at 524 n. 21. In *Hicks*, Colorado correctly held that "the constitutional right of an accused to a speedy public trial is not waived by inaction on the part of the accused." 148 Colo. at 31, 364 P.2d at 880 (construing article II, section 16 of the state constitution). In distinguishing between the demand waiver and knowing waiver, the

Colorado Supreme Court made clear that "absent these advisements of court, there can be knowing and intentional waiver by the pro se defendant" of his right to jury trial.

Christie went on to state that "...there is a significant difference between informed in-action which takes place in the vacuum of knowledge (...) and informed in-action (...). In the former case, there is in fact no decision not to act, rather, the defendant is unaware that there is an opportunity or need to act at all." In the face of such express advisements, however, the *pro se* defendant's "failure" to meet the prerequisites to a jury trial is in fact a conscious "decision" not to exercise his right to a jury trial. *See Curtis*, 681 P.2d at 514 ("A waiver is an intentional relinquishment of a **known** right or privilege.")

Conflict exists among the highest courts of several states however, as some other Courts refuse to compel a defendant to pay for a jury trial See, e.g. *State v. Cushing*, 399 A.2d 297, 298 (N.H. 1979) (concluding "that a criminal defendant cannot be required to purchase a jury trial--even for so nominal a sum as eight dollars"). Some states, requiring payment as with Colorado's rule must not let such rule be read alone:

"The Rule which requires the written demand for a jury trial (Colorado Rule 223) cannot be considered in isolation from the other applicable rules. Thus, (Colorado) Rule 210 provides that arraignment shall be conducted in open court, that the municipal court shall inform **all** *pro se* defendants of their rights,

including the right to a jury trial, and that the prerequisite written demand and fee for a jury trial shall be made known to the pro se defendant. *See* C.M.C.R. 210(a). Absent these advisements, of course, there can be no knowing and intentional waiver by the *pro se* defendant." (emphasis added)

Here, once the court made known to defendant the " ten days - 25 dollar" rule applied, during defendant's first appearance in court, defendant then made a written jury trial demand within ten days, requested a six person jury, and paid the jury fee.

Whether *pro se* or represented by counsel it is the duty of the Court to insure that any waiver of a jury trial is a knowing, intentional, voluntary act.

"[B]ecause the right to a jury trial is a personal right which can be waived only by the defendant, the court still must ascertain whether any "failure" to make the written demand for a jury trial by a defendant with counsel is in fact the informed decision of the defendant. In practice, then, the municipal court at arraignment must ensure that the defendant has been advised of the prerequisites under the Rule." *Christie*, id.

Since the trial judge was familiar with the two police officer witnesses who often appear in his court , and choose to believe their contested version of events over the defendant and both independent lay witnesses, it is clear that a jury of peers may have come to a completely different conclusion than the trial court. This is why a independent jury who doesn't know any of the witnesses, judges, or

attorney's is vastly preferable to a trial judge, who although he doesn't know defendant or his counsel, knows the police officer witnesses, and the prosecutor. Even a well intentioned judge may have biases and prejudices hidden from even himself.

Here, the evidence is clear that Mr. Anselmo made no conscious decision to waive a trial by jury. The evidence shows that Mr. Anselmo does not practice in Colorado, has never had a client in Colorado, had never appeared in Court in Colorado, and does not practice criminal law. The District Court concluded that simply because Mr. Anselmo is an attorney he is presumed to know all the laws. But every citizen is presumed to know the law, not just lawyers. As a practical matter, simply because one is a lawyer doesn't mean that one is an expert in all areas of the law. There are ethical restrictions on competency to insure a hapless litigant is not paired with such an attorney. A securities lawyer doesn't necessarily understand workers compensation, or criminal law, or patents, or water law just as a doctor who delivers babies probably doesn't know about dentistry, liposuction, rheumotology or brain surgery. Yet the lower courts say defendant must do brain surgery on himself invoking the old saw about a lawyer representing himself is twice a fool.

Clearly, in this case, since the court failed to abide its duty to arraign defendant in open court, advise defendant of his rights, including his right to a jury trial, his duty to make a written demand and pay a fee, and the consequences of the defendants in-action, there is no knowing, intelligent, or voluntary waiver. Rather, the waiver in a "vacuum of knowledge" as referred to in *Christie* occurred

which should not deprive a defendant of his right to jury trial.

VIII. DEFENDANT IS FUNDAMENTALLY ENTITLED TO PAID COUNSEL OF CHOICE

The sixth amendment guarantees as a fundamental Constitutional right, the right

not just to have counsel, but to have counsel of choice, *Gideon v. Wainwright*, 372 U.S.

335; *Anaya v People*, 764 P.2d 1256 (1985).

"The fundamental right to counsel is guaranteed by the Sixth Amendment to the United States Constitution, and is considered essential to a fair trial. *Argersinger v. Hamlin*, 407 U.S. 25, 32 L. Ed. 2d 530, 92 S. Ct. 2006 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963); *Anaya v. People*, 764 P.2d 779 (Colo. 1988), "People v Arguello, 772 P.2d 87 (1989); (Colorado Constitution Article II, Section 16, Martinez v People, 172 Colo. 82 (1970)).

It long has been recognized that "an accused who desires and is financially able should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53, 77 L. Ed. 158, 53 S. Ct. 55 (1932). **See also** *Chandler v. Fretag*, 348 U.S. 3, 9-10, 99 L. Ed. 4, 75 S. Ct. 1 (1954). We recognized a defendant's right to retain counsel of choice in *Rodriguez v. District Court*, 719 P.2d 699 (Colo. 1986), where we stated: A defendant's right to be represented by counsel of choice is grounded in the jurisprudence of the sixth amendment to the United States Constitution and is entitled to great deference. This guarantee reflects the substantial interest of a defendant in retaining

the freedom to select an attorney the defendant trusts and in whom the defendant has confidence. . . Because the preservation of this freedom of choice of counsel is a central feature of our adversary system, it is of substantial importance to the integrity of the judicial process. **Id.** at 705-06 (citations omitted), cited in Anaya v People, 764 P.2d 779 (Colo., 1988).

The right to defend is a personal right given directly to the defendant because it is the defendant "who suffers the consequences if the defense fails." *Faretta v. California*, 422 U.S. 806, 819-20, 834, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975). As the Supreme Court emphasized: [a]n unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not **his** defense. **Id.** at 820-21 (emphasis in original). Anaya, Id.

Therefore there must be some mutuality of thought, unity of strategy, and identity of action between the accused and his counsel, Glasser v U.S., 315 U.S. 60, 70 (1942).

"When the standard governing the decision of a particular case is provided by the Constitution, close appellate scrutiny is particularly important," *Wheat v U.S. as cited in Bose Corp. v Consumers Union*, 466 U.S. 485 (1984).

Here, the trial court disallowed substitution of chosen counsel without any claim or showing of prejudice other than inherent in the passage of time.

A brief continuance is sought a few weeks before trial to allow hired counsel attorney Mitch Baker to prepare and avoid scheduling conflicts even though defendant waives his right to a speedy trial.

"In addition to the exceptions and exclusions that are specifically addressed by the speedy trial statute, there may be circumstances where a reasonable delay is necessary to protect other fundamental constitutional rights of the defendant. In such an instance, the statutory speedy trial right must yield to protection of a defendant's constitutional rights. Key among a defendant's constitutional rights in this context is the defendant's right to counsel, a fundamental right guaranteed by the Sixth Amendment to the United States Constitution. See *Argersinger v. Hamlin*, 407 U.S. 25, 32, 32 L. Ed. 2d 530, 92 S. Ct. 2006 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 344, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963); *People v. Arguello*, 772 P.2d 87, 92 (Colo. 1989); *Anaya v. People*, 764 P.2d 779, 781 (Colo. 1988). As the district court implicitly recognized, sufficient time for trial preparation is a necessary antecedent to providing effective assistance of counsel. See Scales, 763 P.2d at 1048," *State v Gallagher*, 933 P.2d 583 (1997). When a trial court is required to substitute defense counsel, the defendant's right to effective assistance of counsel may be jeopardized by the strict adherence to the statutory speedy trial right because the substitute counsel has inadequate time to prepare, Id.

"(T)he interest in judicial efficiency cannot override the fundamental right of an accused to be represented by counsel." ***King***, 728 P.2d at 1270 ***Anaya***, 732 P.2d at 1243.

2. EXPRESS EVIDENCE OF PREJUDICE OR INCOMPETENCE IS NOT REQUIRED

In ***Flanagan v. United States***, 465 U.S. 259, 79 L. Ed. 2d 288, 104 S. Ct. 1051

(1984), the United States Supreme Court stated:

[T]o the extent that the asserted right to counsel of one's choice is like, for example, the Sixth Amendment right to represent one's self . . . [o]btaining reversal for violation of such a right does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding. . . . No showing of prejudice need be made to obtain reversal in these circumstances because prejudice to the defense is presumed. **Id.** at 267-68 (citations omitted).

Individual members of the Court have indicated that a new trial is required when the trial court erroneously disqualifies the defendant's counsel of choice. *See Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 1700-1704, 100 L. Ed. 2d 140 (1988) (Marshall, Brennan, JJ., dissenting); **id.** at 1704 (Stevens, Blackmun, JJ., dissenting); *Morris v. Slappy*, 461 U.S. 1, 27-28 (1983) (Brennan, Marshall, JJ. concurring). **See also** *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 443, 86 L. Ed. 2d 340, 105 S. Ct. 2757 (1985) (Stevens, J. dissenting) ("[I]n a criminal case an erroneous order disqualifying the lawyer chosen by the defendant should result in a virtually automatic reversal. . . ."). Several courts which have addressed directly the issue now before us have rejected the harmless error rule and have held that reversal is required when a defendant unreasonably has been denied his choice

of counsel. **See e.g.** *United States v. Washington*, 797 F.2d 1461, 1467 (9th Cir. 1986); *United States v. Rankin*, 779 F.2d 956, 961 (3d Cir. 1986); *Wilson v. Mintzes*, 761 F.2d 275, 281 (6th Cir. 1985); *United States v. Laura*, 607 F.2d 52, 58 (3d Cir. 1979); *Harling v. United States*, 387 A.2d 1101, 1106 (D.C. App. 1978). In *Linton v. Perini*, 656 F.2d 207, 211-12 (6th Cir. 1981), the court stated: Evidence that a defendant was denied this right [to retain counsel at his own expense] arbitrarily and without adequate reason is sufficient to mandate reversal without a showing of prejudice. Basic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel. **See also** *United States v. Burton*, 189 U.S. App. D.C. 327, 584 F.2d 485, 491 n.19 & 498 (D.C. Cir. 1978), **cert. denied**, 439 U.S. 1069, 59 L. Ed. 2d 34, 99 S. Ct. 837 (1979) (prejudice is not a prerequisite to determining whether the right to select one's own counsel was violated, and if that right was violated, the error cannot be harmless). Anaya, Id.

Two considerations weigh heavily against adopting a harmless error analysis. First, as concluded in *People v. Castro*, 657 P.2d 932, frequently it is impossible to show prejudice in these circumstances. In his concurrence in *Morris v. Slappy*, 461 U.S. at 27, Justice Brennan contrasted a claim of ineffective assistance of counsel with a claim of deprivation of one's counsel of choice. He observed that in an ineffective assistance of counsel claim, it may be appropriate to require a showing of prejudice "because courts are able to assess an attorney's performance and the effect of that

performance on a defendant's rights based on the records before them." **Id.** When a defendant has been denied his counsel of choice, the same judgments cannot be made by the reviewing courts. "The fact that a defendant has been arbitrarily denied his interest in preserving his relationship with a particular attorney, with the result that the attorney does not appear, means that there is no record on which to base judgments regarding prejudice." **Id.** Accordingly, "there is no way to know whether the character of the proceedings would have changed, whether counsel would have made different decisions, or whether the defense strategy would have been different if [counsel of choice] had represented [the defendant]." **Id.** at 28. Under these circumstances, prejudice to the defendant is assumed without the necessity of showing specific prejudice. **See** *United States v. Dougherty*, 154 U.S. App. D.C. 76, 473 F.2d 1113, 1148 (D.C. Cir. 1972) ("[I]f the conventional doctrine of harmless error is applied, it will in effect undercut the right of pro se representation, since rarely if ever can there be a showing of prejudice in terms of result from the conduct of a trial by counsel.").

Second, to adopt the court of appeals' suggestion that a defendant be required to show that his substitute counsel rendered ineffective assistance would be to make the defendant's right to counsel of choice meaningless. **See** *Davis v. State*, 292 Ala. 210, 291 So. 2d 346 (1974) (in the reversal of a conviction, the reviewing court need not take into consideration whether substitute counsel afforded competent representation when accused's choice of retained counsel was denied). **Cf.** *United States v.*

Watson, 496 F.2d 1125 (4th Cir. 1973) (application of the harmless error doctrine to the denial of a federal statutory right to two attorneys in a capital criminal case "eviscerated" that right even though the record indicated the defendant was fairly tried). This is so because a showing of ineffective assistance of counsel, in and of itself, is reversible error. **See** *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *People v. Pozo*, 746 P.2d 523, 526 (Colo. 1987); *Hutchinson v. People*, 742 P.2d 875, 886 (Colo. 1987). Imposing this standard on a claim of erroneous disqualification of counsel of choice allows no remedy at all for deprivation of that right.

IX. SUPPRESSON OF SUBSEQUENT CONDUCT IS REQUIRED

The evidence readily bears out that all he crimes charged flowed from acts subsequent to an illegal seizure and investigation without probable cause which therefore must be supressed as the fruit of the poisonous tree. The District Court declined to review this issue: "Because neither Anselmo nor his counsel preserved these issues before or during trial, the argument is not properly before this court." 3-10-99 Judge Hickman, page 10. However, this is incorrect.

Mr. Tooley: The first deals with a motion to suppress, RP pg. 15, lns. 16-17.

The Court: (W)hat is it you seek to suppress, again, so I can kind of pay attention or focus on that testimony?

Mr. Tooley: ... I'm seeking to suppress any and all evidence, ...after their initial contact with him... . pg. 16, lns. 7-10.

X. CONCLUSION

For each of the foregoing reasons therefore the relief requested above must be granted.

Respectfully Submitted

Defendant-Appellant
Phillip Ernest Anselmo in propria persona
926 Grove Street, Suite No. 10,
San Francisco, California 94117
(415) 771-0500

Certificate of mailing:

I hereby certify that on this 20th day of November, 2000 the foregoing "Petition for Writ of Certiori" was deposited in U.S. mail with sufficient postage addressed as follows:
Suzanne Staiert ,Clerk
Attorney for appellee
District Court
7325 S. Potomac St.
Englewood, CO 80112

And Municipal Trial Court
15001 East Alameda Drive
Aurora, Colorado 80012

APPENDIX

SUPREME COURT STATE OF COLORADO CASE NO. 00SC358 ~ CERTIORARI TO THE DISTRICT COURT, ARAPAHOE COUNTY, 99CR1304 MUNICIPAL COUNTY, CITY OF AURORA, #98-43088 ORDER OF COURT PHILLIP ANSELMO, Petitioner,

v.

[filed: August 21, 2000]

THE PEOPLE OF THE-STATE OF COLORADO and THE CITY OF AURORA,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the District Court of Arapahoe County, and after review of the record, briefs, and the judgment of the District Court,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

/s

BY THE COURT, EN BANC, AUGUST 21, 2000.

Phillip Ernest Anselmo
926 Grove St., Ste. 10
San Francisco, CA 94117

Suzanne Staiert
Legal Dept.
City of Aurora
15001 E. Alameda
Aurora,CO 80012

COLORADO SUPRREME COURT

The People of the State of Colorado
And the City of Aurora,

Municipal Case # 98-43088

Judge Stine
v.
District CASE # 99-CR-1304

Judge Hickman
Phillip Anselmo
Appellant-Defendant

ORAL ARGUMENT REQUESTED

NOTICE OF DESIGNATION OF TRANSCRIPT AND CLERKS PAPERS

To the Municipal Court clerk and
To Jean Sertich, Court Reporter:

Please take notice that plaintiff-appellant above named does hereby designate and request any and all clerks' papers in this above entitled action be transmitted immediately to the Supreme Court clerk for the State of Colorado, in accordance with CAR 10. The detailed designation of the record is set out as follows:
9-12-98 SUMMONS

9-28-98 LETTER REQUESTING PRELIMINARY HEARING
11-25-98 PRELIMINARY SETTING
12-1-98 JURY DEMAND AND FEE TENDER
12-3-98 MOTION FOR JURY TRIAL SETTING
01-4-00 JURY TRIAL RESETTING
1-29-00 JURY TRIAL DEMAND
2-12-99 NOTICE OF TOOLEY APPEARANCE
2-19-00 RENEWED JURY TRIAL DEMAND
03-9-00 24-10-109 CLAIM
3-31-99 NOTICE OF SUBSTITUTION AND REQUEST FOR CONTINUANCE

Further, plaintiff-appellant does request that the entire transcript of proceedings of 11-25-98 and trial of 4-12-99 completed by Jean Sertich on Nov. 9, 1999, as certified by Judge Alan Stine on Nov. 10, 1999, also be transmitted.

Your prompt attention to this matter is appreciated

Dated this 15th day of April, 2000.

Phillip Ernest Anselmo
in propria persona
926 Grove Street, Suite No. 10,
San Francisco, California 94117
(415) 771-0500

Distict Court in and for
the County of Arapahoe

People of the state of Colorado
Municipal Case No. 98-43088

v.

Anselmo, Phillip Ernest

Appellants' Opening Brief

Presented by:

Phillip Ernest Anselmo
926 Grove Street, Suite #10
San Francisco, CA 94117
(415) 771-0500

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ORALLY IDENTIFYING HIMSELF?

. MAY A PERSON WHO PRESENTS NO ARTICULABLE THREAT OF HARM TO ANYONE AND IS NOT SUSPECTED OF CARRYING A WEAPON BE SUBJECTED TO A FRISK?

9. MAY A PERSON BE CONVICTED FOR RESISTING ARREST SIMPLY BECAUSE AN OFFICER PERCEIVES THAT THE PERSON IS "TENSE" WHILE BEING ARRESTED?

10. MAY A PERSON BE CONVICTED OF RESISTING ARREST WHEN AN ILLEGAL SEIZURE OCCURS AND THE ARREST OCCURS THEREAFTER?

11. MAY A PERSON BE CONVICTED OF ANY CRIME WHEN AN ILLEGAL SEIZURE OCCURS?

INTRODUCTION AND SUMMARY OF CASE

Just after Mr. Anselmo entered the "Stampede" dance club he is seized from behind by two unseen men. One of the men, a plain clothed bouncer accompanied by a uniformed man in the dark and loud club gestures for Mr. Anselmo to go into the entrance hallway. There, upon inquiry from a man saying he a bouncer, Mr. Anselmo states that he did not pay a three dollar cover as he had permission from the cashier to enter to look around.

The "Stampede" is a cowboy style bar. Mr. Anselmo is dressed in shorts and a Hawaiin shirt.

No one ever bothers, even to this day, to check whether Mr. Anselmo's statement is true. Significantly, at trial, the cashier was not produced by the prosecution and did not respond to defense counsel's efforts to appear.

When Mr. Anselmo attempts to leave he is stopped by the uniformed man who tells Mr. Anselmo he is a police officer. The officer demands identification. Mr. Anselmo properly and correctly identifies himself. The police officer demands physical identification.

Mr. Anselmo states that he doesn't think he has any physical identification and states that he has already properly identified himself. A debate ensues about whether citizens must carry physical identification, as claimed by the police officer.

Mr. Anselmo, a North Denver native who attended the University of Colorado in Boulder and the University of Lancaster in Great Britain on academic scholarships is in fact is a forty three year old licensed attorney living in California.

The officer runs a warrant check and calls for backup. There are no warrants. Mr. Anselmo has never been previously arrested.

Unknown to the police officer a military and civilian police officer witness, Dr. Darrell Humphrey, states that he has time to go in and out of the club two more times, smoke several cigarettes outside, and engage in conversation with patrons while he is waiting for the police officer to release Mr. Anselmo. Instead, he eventually sees two back up patrol cars arrive. Suddenly three more policemen charge into the dance

hall with their billy clubs drawn.

The next thing he sees Mr. Anselmo, in handcuffs, being escorted by one officer to a squad car. In the police car on the way to the station, the police officer states: "Now who is right about having to carry identification."

At trial the police officer states that if Mr. Anselmo had produced physical identification he would have been released immediately after he was seized.

II. STATEMENT OF THE CASE

Despite Mr. Anselmo's demand for a jury trial at the intial appearance, the judge tells Mr. Anselmo he has no right to a jury. Nonetheless, within less then ten days after this first appearance, Mr. Anselmo pays the proper jury fee and by written demand asks for and receives a six person jury trial setting.

Later, the clerk unilaterally vacates this jury trial and despite repeated attempts to have a jury trial, Mr. Anselmo never receives a trial by peers.

Because of philosophical differences with a referred attorney with whom Mr. Anselmo never had met, Mr. Anselmo seeks

a brief continuance to have his counsel of choice substituted with whom Mr. Anselmo had met and conferred. The court, despite no prejudice to any party or witness, denies Mr. Anselmo his counsel of choice.

Mr. Anselmo was convicted of trespass, not for not paying a three dollar cover, which the trial judge concluded was irrelevant, but because he was prevented from leaving the club by the police officer who insisted on physical identification.

Mr. Anselmo was also convicted of resisting arrest and refusing to obey the order of resisting arrest, when, after peacefully debating the issue of compulsory carrying of identity papers for fifteen minutes, the detaining officer's backup arrived and the officer decided this slightly built, forty three year old man in shorts and Hawaiin dress shirt was "tense" when the officer felt a sudden unarticulated need to spin him around to conduct a pat down search for weapons.

Although no one claims Mr. Anselmo ever even attempted to throw a blow, he ended up being dragged by the police across the floor after he was handcuffed and

until another officer ended up with his foot smashed across Mr. Anselmo's head.

The bouncer, who was attending to other business at this time, testified that he never considered Mr. Anselmo a threat to himself or any customers and that he could have, if the need arose, handle Mr. Anselmo easily by himself. The officers also admitted that during this time all Mr. Anselmo said was "Why are you hitting me?/ Why are you choking me?"

III. PROCEDURAL HISTORY

On Sept. 12, 1998, Mr. Anselmo was summoned to answer certain charges scheduled before the court on October 9, 1998 at 8 a.m.. In response, Mr. Anselmo sent a letter to the court being not guilty, waiving his right to speedy trial in that regard, and requesting the matter be set for preliminary hearing (CP).

The matter was set for pretrial hearing on November 25th 1998 at 1:30 p.m. in Division I. This was Mr. Anselmo's first appearance. At this first appearance, Mr. Anselmo demanded trial by jury, RP 11-25-99 at pg. 3, lns 12-22; RP 4-12-99 pgs. 6-8. The court advised Mr. Anselmo that he had a duty to request a jury trial by letter on Oct. 9,

1998, ID. Mr. Anselmo indicated that he never made appearance before this November 25th appearance(CP). Mr. Anselmo further indicated that he did not know about any rule which would result in an involuntary waiver of a jury trial. Nevertheless, the matter was set for trial before the court on February 16, 1999, RP 11-25-99, pg. 7, lns. 7-10.

Within ten days after this first appearance on November 25th, 1998, Mr. Anselmo wrote to the court requesting a six person jury trial and depositing jury fees. In response to this demand and deposit, the clerk set the matter for the six person jury trial at 9 a.m. on January 19, 1999. (CP)

Mr. Anselmo requested that the matter be rescheduled to its original trial date of February 16, 1999 with a six person jury.

The jury trial, originally set for January 19, 1999, was then unilaterally set by the clerk as a Court trial rather than the jury trial for February 16. Mr. Anselmo therefore wrote the clerk on January 29, 1999, indicating that the jury trial was inadvertently now scheduled to be a trial before the court,

requesting again a jury trial.

The Clerk responded by indicating that the 25 dollar deposit, although already negotiated, was being returned.

In a subsequent letter, after receipt of the the 25 dollars from the Aurora Municipal Court's treasury, Mr. Anselmo returned the court's check once again demanding a jury trial.

On February 12, 1999, the law firm of Dill, Dill and Carr entered an appearance and requested this matter be continued to allow counsel the opportunity to prepare. This motion granted, trial is set for April 12, 1999.

Then, Mr. Anselmo, having certain significant philosophical differences with Patrick Tooley, an attorney with Dill, Dill, and Carr whom he had never met, sought different counsel. After an in person meeting with counsel Mitchell Baker, Mr. Anselmo and Mr. Baker agreed that Mr. Baker would assume representation and trial. Mr. Baker, due to time constraints and calendar conflicts, moved the Court for a brief continuance in order to prepare and be available. The Court denied Mr. Baker's motion which, by default, had the

consequence of leaving Mr. Anselmo now with-out counsel of choice, but with Mr. Tooley as counsel.
CP; See Also RP 4-12-99, pg. 10, lns. 10-13.

In the Court's order denying counsel of choice, the Court failed to specify or articulate the basis for decision. The court further failed to demonstrate that any prejudice would accrue to any person or party by a brief continuance of the court trial.

IV. The Trial Testimony

Arapahoe police officer Cernich testified that his initial contact with Mr. Anselmo was because he simply was following a bouncer but didn't know what was occurring at that point RP pg. 52, lns. 16-20. The bouncer believed that Mr. Anselmo may not have paid a three dollar ($3.00) cover charge at the Stampede so he wanted to advise him of this charge, RP pg. 45, lns 9-12.

Many people don't know that there is a cover charge according to the bouncer, RP pg. 45, lns. 1-7, and others don't need to pay, pg. 45, lns. 13-20.

Because Mr. Anselmo was between 21-45 feet from the bouncer when first seen Id., pg

38-39, lns. 8-6 and standing in front of speakers in a loud dance hall Id. pg. 25, lns. 8-10, the bouncer intended to ask Mr. Anselmo to step into an adjoining hallway to talk Id.

Officer Cernich said he followed a bouncer, and then, still unaware of what was happening, RP pg. 53, lns. 3-5, he and the bouncer suddenly seized Mr. Anselmo by the arms from behind, RP pg. 116, lns. 6-10; pg. 53, lns. 14-16; 54, lns. 15-18. Then because of the loud music, RP pg. 39, lns. 7-9; pg. 72, ln. 18, they proceeded to a corridor to converse, RP pg. 116-17, lns.17-8.

Mr. Anselmo explained that the cashier had permitted him to "check it out" before paying a cover RP pgs. 117-19, lns. 1-24; pgs. 55-56, lns. 17-2;. The bouncer then stated: "this is our bar and we tell you what to do." Whereupon Mr. Anselmo stated: "Fine, I'll take my business elsewhere, RP pg. 120, lns. 1-7. He started to leave but was precluded from so doing by police officer Cernich standing in front him, between Mr. Anselmo and the door, demanding identification, RP pg. 120, lns. 8-17; pg. 29, lns. 21-24; pg. 50. Lns. 1-13;

pg. 42, lns. 3-9; pg. 47, lns. 3-9; pg. 56, lns. 17-18; pg. 57-58, lns. 19-8.

Neither the officer or the bouncer ever bothered to verify with the cashier Mr. Anselmo's statement that he was allowed to not pay a cover while he "checked the place out." RP pg. 33, lns. 9-16; pgs. 66-67 lns. 16-11; pg. 34 lns. 17-4; pg. 74, lns. 2-9 Instead, the bouncer left, leaving the matter with the police officer RP pg. 49, lns. 2-9.

The bouncer, Butch Ealthon Smith, said that if it were up to him he would simply ask Mr. Anselmo to pay $3.00 or leave, RP pg. 27, lns 10-16; that Mr. Anselmo was no threat, pg. 44, lns. 19-24; that Mr. Anselmo never refused to leave, pg. 41, lns. 22-24; pg. 26, lns. 5-6; pg. 29, ln. 12; pg. 42, lns. 7-9; that Mr. Anselmo was definitely not drunk, RP pg.43, lns 4-7; that Mr. Anselmo was non-resistive, pg. 27, lns. 3-4; pg 46, lns 19-23; pg. 47, lns 21-24; pg. 48, ln. 22; that even though Mr. Anselmo properly and correctly identified himself, RP pgs. 77-78, lns. 24-5, that Mr. Anselmo was stopped from leaving by the police officer who demanded physical identification

whereupon a debate ensued about whether or not citizens must carry identification, RP pg. 120-23, lns. 18-25; pg. 47, lns. 6-10; pg. 57-58, lns. 21-23, pg. 59, lns.9-12.

Police officer Cernich insisted that every citizen had a duty to carry around identification, RP pg. 124-125, lns. 14-10, pg. 57, lns. 21-23; pg. 47, lns. 6-10. Mr. Anselmo an out of state attorney active in pro bono and foreign relief work, RP pgs. 130-31, lns. 2-4; pg. 126, lns. 5-21; pgs. 108-109, lns. 10-18, expresses his opinion that no citizen had a duty to carry identification, RP 124-125, lns. 25-10.

Mr. Anselmo was not free to go because of the police officer's insistence that Mr. Anselmo produce physical identification RP pg. 141-42, lns. 14-2. The police officer requested assistance via his radio, and continued to demand physical identification, RP pg. 77, lns. 24-8; pg. 59, lns. 9-18.

Nevertheless, Mr. Anselmo did immediately orally identify himself, giving correct information about his name, address, and date of birth, Id; pg. 178, lns. 15-24. The officer was able to verify this

information but still called for backup, Id. After backup arrived, when no one was in the corridor to see what would happen, RP pgs. 127-129, lns. 11-4. Mr. Anselmo was jumped by officer Cernich who was assisted by the other officers in beating Mr. Anselmo RP pg 129, lns. 4-18; pg. 60-62, lns.14-15.

Only officer Cernich and Petrillo testified at trial. They both stated that Mr. Anselmo never threw a blow or attempted to hit an officer, but instead cried : Why are you hitting me-- Why are you hurting me? RP id; pg. 80, lns. 7-18.

Mr. Anselmo was then booked. Mr. Anselmo was denied the right make a phone call at the earliest opportunity, to have a friend, attorney, or family member post bond. He was kept in solitary for hours without being advised of the charge against him. Finally he was incarcerated in a cell with a regurgitating drunk even though all of the other cells are either empty or only had one prisoner, RP pg. 134, lns. 3-23.

This trial it is not about whether Mr. Anselmo did or did not pay a three dollar cover charge. Rather, it is about whether a citizen has the right

to engage in free converse with a police officer, and to disagree, without the threat that the officer, in the abuse of authority, will incarcerate the citizen.

Officer Cernich insists that he had an absolute right to demand and obtain physical proof of identification from Mr. Anselmo even though Mr. Anselmo didn't think he had any physical identification. Officer Cernich believes Mr. Anselmo must carry identification. Mr. Anselmo expresses his believe that he has a First Amendment right to disagree with the police officer, that one of the great freedoms of this country is not have to carry identity papers or obtain permission to travel between different districts or states. Mr. Anselmo expresses this believe in the forum of the corridor of the dance hall. The officer unilaterally decides that a better forum for the expression of this opinion is from the inside of a jail cell.

At trial, police officer Cernich testified that he arrested Mr. Anselmo because "of his belligerent attitude" and because "I could see where this was going." Mr. Anselmo was not

arrested because he did not pay three dollar cover charge; he was not arrested because he refused identify himself; he was not arrested because he broke any other law. He was arrested because he had the audicity to stand up like a man and enter into a dialogue with a policeman, rather than cower and say yes officer about an important issue about which they disagreed, pg. 63, lns. 24-25. Even Officer Cernich testified that he would have released Mr. Anselmo if he had produced physical identification, but that correct oral identification was not sufficient, RP pg. 78, lns. 13-25; pg. 58, lns. 14-17; pg. 64, lns. 19-21, pg. 57, lns. 13-23. Instead, Officer Cernich testified that this entire case "...more or less ... became the issue over the ID... that resulted in his arrest," RP pg. 63-64, lns. 24-2.

There is a famous story in which President Roosevelt remarks upon seeing two Chinese nationals in a heated argument " I'm surprised that the one fellow didn't just hall off and hit the other fellow" to which the Chinese ambassador replied: "That would mean that the one fellow had simply run out of ideas."

Defendant is entitled to

express himself freely about deeply felt Constitutional beliefs, even to a disagreeing police officer, without fear of being arrested. Mr. Anselmo has the right to travel and to be in a public place without carrying physical identification. Defendant has the right to a jury trial. Most importantly in the context of this appeal, defendant has the right to counsel of his choice under the sixth and fourteenth amendments, according to the precedents below.

STATEMENT OF THE LAW

I. THE COURT ERRED BY REFUSING COUNSEL OF CHOICE

The Colorado State Supreme Court in Anaya vs. The People of the State of Colorado, 764 P.2d 779 (1988, holds: "when a defendant has been denied his counsel of choice...with the result that the attorney does not appear, this means that there is no record on which to base judgments regarding prejudice ...there is no way to know whether the character of the proceedings would have changed, whether counsel would have made different decisions, or whether the defense strategy would have been different if (counsel of choice) had represented (the defendant)." Citing Morris vs. a

Slappy, 461 U.S. at 27, 103 Sup.Ct. at 1624.

"Under these circumstances, prejudice to the defendant is assumed without the necessity of showing specific prejudice. See United States vs. Dougherty, 473 F.2d 1113, 1148 (D.C. Cir. 1972)\c 3."

Therefore, there's no need "...to show that his substitute counsel rendered ineffective assistance..." To do so would "...make the defendant's right to counsel of choice meaningless." Accordingly, trial court's exclusion of defendant counsel of choice is reversible error, Wheat vs. United States, 486 U.S. 153, 108 S.Ct.1692,1700-74, 100 L.Ed.2d 140 (1988).

"Basic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel." Linton v Perini, 656 F.2d at 211 (6th Cir 1981) as cited in Morris, Id.

Here, the only reason that substitute counsel was not allowed, as claimed by the court, was because the court trial had already been set. There were no old, impaired, or departing witnesses whose interests required accommodation; there was no jury to accommodate; any

witnesses who did appear at trial would have appeared regardless of a continuance for the substitution of counsel.

Morris follows the earlier Colorado case of Rodriguez vs. District Court, 719 P.2d 699 (Colorado 1986): "A defendant's right to be represented by counsel of choice is grounded in the jurisprudence of the sixth amendment to the United States Constitution and is entitled to great deference. This guarantee reflects the substantial interest of a defendant in retaining the freedom to select an attorney the defendant trusts and in whom the defendant has confidence.... Because the preservation of this freedom of choice of counsel is a central feature of our adversary system, it is of substantial importance to the integrity of the judicial process."

Thus, the trial courts refusal to allow substitute counsel of choice is reversible error.

II. THE COURT ERRED BY REFUSING A JURY TRIAL

In People vs. Christie, 837 P.2d 1237 (1992), arising out of Arapahoe County District Court, the Colorado Supreme Court, following federal precedents, rejected the "demand-waiver doctrine." See Barker vs. Wing,

407 U.S. 514, 92 S.Ct. 2182, 33 Lawyers Edition 2d 101 (1972). The court in Christie held that one could not waive a right to a jury trial by failure to demand a jury trial unless and until one was specifically apprised and had knowledge of ones right to jury trial. A waiver of the right to jury trial cannot be presumed by in-action--, rather, it requires a knowing and intentional waiver by the defendant.

"...[T]here is significant difference between uninformed inaction which takes place in a vacuum of knowledge (...) and informed inaction... . In the [latter] case, there is in fact a "decision" not to act; (here) rather, the defendant is unaware that there is an opportunity or need to act at all." Barker vs. Wing, 407 U.S. 514, 92 S.Ct. 82, 33 L.Ed.2d 101(1972) \c 2(rejecting the demand waiver doctrine) as cited in Christie ibid.

Here, the trial court failed to follow C.R.S. 16-10-109 and 13-10-114 which require that the trial court apprise a defendant of the details of his right to a jury trial and consequent failure to timely elect a jury trial. Here, because the trial court did

not advise defendant of his right to jury trial, the defendant did not make a knowing, voluntary waiver of his right to a jury trial. Instead, the record shows that at his first appearance, defendant, in court, demanded the jury trial. Further, within ten days after his first appearance, a written demand for jury trial along with a check for the jury fee was paid.

Rule 210 requires that trial "...court advise all pro se defendants of their rights, including the right to a jury trial", and requisite written demand and fee. Christie, ibid.

Trial courts must adhere strictly to the requirements of advisements in order to show that a waiver is voluntarily made, People vs. Sandoval, 188 Colo. 431, 433, 535 P.2d 1120, 1121 (1975); Mulkey v Sullivan 753 P.2d 1226 (Co. 1988). Here, no advisements were given.

"Absent these advisements, of course, there can be no knowing and intentional waiver by the pro se defendant," Christie supra, 837 P.2d 1237 (1992). *See also* People vs. Curtis, 681 P.2d 504, 511 (Colo. 1981); People vs. Hicks 364 P.2d 877 (1961).

Further, "courts do not presume

acquiescence in the loss of fundamental constitutional rights, and therefore indulge every reasonable presumption against waiver." People v Curtis, 681 P.2d 504 at 514 (Colorado 1984). Citing Duncan vs. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968).

Thus, the Colorado Supreme Court respected U.S.C.A. 6,14; C.R.S.A. Art 2, section 23 and section 16 in concluding that the jury trial is a fundamental right which cannot lightly be waived. Colorado therefore followed United States Supreme Court precedents, and Colorado precedents of Curtis 681 P.2d 504,511 (Colo. 1980) and Hicks, 364 P. 2d 877 (1961), both indicating the Constitutional dimension of the right to jury trial.

Here, the Court did not advise the defendant of his rights to jury trial nor undertake to ascertain whether the defendant made an informed and voluntary decision to waive a jury. Therefore, court committed reversible error.

III. The ARREST is FOR NOT PRODUCING IDENTIFICATION, NOT FOR TRESPASS.

A. ANY TRESPASS WAS CAUSED BY COMPLYING WITH A POLICE ORDER TO STOP

Section 94-71 trespass, of which defendant was convicted, occurred in a public dance hall called the Stampede. Stampede was open for business on the night in question. The ordinance states: "a person commits trespass if that person...refuses to leave private property of another, when immediately prior to such entry or refusal to leave...oral or written notice is given by the owner...or person responsible for the care of the property that such entry or continued presence is prohibited.

Although the testimony is disputed as to whether or not defendant was ever asked to leave by anyone, it is clear that defendant was never asked to leave by the owner, and never given any written signed notice by the owner or other person with authority to control access prohibiting return to such property or commercial establishment. It is undisputed that defendant was precluded from leaving because he was "seized"

by the police officer. After Mr. Anselmo stated that he would "take his business elsewhere," Officer Cernich testified that at that point he told defendant to hold on and demanded to see physical identification, RP pg 56, lns. 12-19. This was corroborated by the bouncer, RP pg. 50, lns 1-13.

If this was investigatory stop, then Mr. Ealthon or officer Cernich should have conferred with the cashier as to whether or not permission was given for Mr. Anselmo to "check the place out." This was not done. Absent such a simple confirmation, the purported suspicion of trespass could not be corroborated. Although the cashier was subpoenaed by the defense to trial, she did not appear.

She was not called as a witness by the prosecution.

The trial judge concluded that this was irrelevant anyway, the trespass did not occur, according to the judge, until Mr. Ealthon claims to request Mr. Anselmo to go, RP pg. 177-78, lns. 22-4. But at this point the police officer demanded Mr. Anselmo not to go but to stop and produce identification. If, as the trial judge concludes, Mr. Anselmo's presence at this point

was not at issue for a charge of trespass, then the officer has no articulable basis for the detention. But Mr. Anselmo was not free to leave.

Instead, after the identifying information was given, transmitted by radio by officer Cernich, and confirmed, Mr. Anselmo continued to be detained by the officer. After identifying himself, Mr. Anselmo should have been released. Since Mr. Anselmo was not released, then the following conduct of the officer was without justification or legal authority.

Even if Mr. Anselmo was asked to leave, Mr. Anselmo cannot be convicted of trespass for following a police officers order to stop and identify himself.

The scope of investigatory stop is based upon whether there is a reasonable suspicion of a crime, and the character of that crime, People vs. Rodriguez, 924 P.2d 1100; 945 P.2d 1351 (1996-97). The approach must be appropriate to the crime, People vs. Mascarera, 726 P.2d 644 (1986). However, after the initial stop, acquisition of identification and explanation has occurred, the right to detain the suspect is

over, People vs. Archuleta, 616 P.2d 977 (1980). Any further detention is tantamount to arrest, People vs. Severson, 39 Co.App. 95 (1977).

Rather than additional detention, after identifying himself and radio confirmation of the identity occurred, at that point at the latest, Officer Cernich should have allowed Mr. Anselmo to leave, People vs. Contreras, 780 P.2d 552 (1989); People vs. Radcliffe 778 P.2d 1371 (1989). By continuing to seize Mr. Anselmo, the officer precluded him from leaving, Terry vs. Ohio, 392 U.S. 119, 88 S,Ct. 1868, and later charging him with trespass for refusal to leave, the officer essentially created the crime.

Mr. Anselmo was thrust upon the horns of a dilemma. He could have ignored the officers order to stop and identify himself thereby not trespassing (because he was leaving) or he could have, as he did, stop, yielding to the officers request for identification and explanation and, by not immediately leaving, be accused, and, as here, be convicted of trespass.

B. THE ILLEGAL SEIZURE REQUIRES SUPRESSION OF SUBSEQUENT ACTS

The fourth amendment grants

individuals the right to security from unreasonable searches and seizures in their possessions and person. The fourth amendment applies to the to the states under the 14th amendment. In Colorado it also specifically applies under Article II, Section 7, of the Colorado Constitution. People vs. Garcia, 79 P.2d 190 (1984)

An arrest without a warrant is presumed to be unconstitutional, People vs. Burnes, 200 Colo. 387,615 P.2d 686 (1980).

Whether proper or not, the continued detention of Mr. Anselmo without advisement of being under arrest, and without advisement of his Miranda vs Arizona, 384 U.S. 436, 86 Supreme Court 1602 (1966) rights, RP pg. 77, lns. 5-13, taints all subsequent statements and actions mandating suppression of all consequent activity, RP pg 59, lns 19-22, People vs. Harry, 859 P.2d 889 (1993). Therefore the resisting arrest and refusing to obey the order of not resisting arrest charges cannot stand, People vs. Connolly, 479 U.S. 157, 107 S.Ct. 515 (1986; Berkemer vs. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984);_.

Essentially, once Mr. Anselmo was seized by the Officer, and

properly identified himself, he had to be released, RP pg. 55, lns. 20-22; pg 57, lns. 6-7; pg. 58, lns 5-8. By the police officers continued wrongful insistence that physical identification be produced, the officer created the crime of trespass. But neither the charge of trespass caused by the continued seizure, nor any subsequent conduct, statements or events can be the basis of any crime due to the continued wrongful seizure. Therfore, these events must be supressed under the Constitution.

C. THE SUBSEQUENT DEBATE ABOUT an IDEA CANNOT PREFACE AN ARREST

This case is not really about whether Mr. Anselmo refused to pay a three dollar cover, thereby trespassing at a commercial establishment.

What this case is really about his whether a citizen has been right to disagree with a police officer about a fundamental constitutional right without being arrested for asserting the opinion.

Although a prudent course might seem to be to adopt an extremely deferential mien ("Yes officer... You are right officer... Yes sir") our founding fathers chose to give their lives in exchange

for fundamental liberties and freedoms. Paramount among those freedoms is the right to think what you will, and say what you think. Our fore-fathers understood that you may not agree with what I have to say but they fought to the death for my right to say it.

"It is therefore axiomatic that as citizens, living under the beneficient protection of the First Amendment, we are entitled to robust debate in a free marketplace of ideas. As such, it must be a fundamental truism they function of free speech under our system of government is to invite dispute. "It may indeed serve its high purpose when it induses a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and pre-conceptions and have profound unsettling effects as it presses for acceptance of some idea." Terminiello vs. City of Chicago, 337 U.S. 1,4, 69 S.Ct. 894, 896, 93 L.Ed. 1131. In effect, if unsettling, disturbing, arousing, or annoying communications could be proscribed, or if they could only be conveyed in a manner that

would not alarm, the protection of the first amendment would be a mere shadow indeed." Bolles vs. People, 541 P.2d 80, 189 Colo. 394 (Colorado 1975).

"Given the preferred status accorded to free speech by the federal and state constitutions, a statute which restricts free speech must be narrowly drawn to avoid criminalizing an intolerable range of constitutionally protected conduct." People vs. Baxter 800 P.2d 599, 602 (Colo. 1990) citing Osborne vs. Ohio, 495 U.S. 103,112,110 Supreme Court 1691, 1697,109 L.Ed.2d 98 (1990), as cited in People vs. Smith, 862 P.2d 939 (Colo. 1993); Colorado Constitutional Article II, Section 10, U.S. constitutional Amendment 1 applies to states through the Constitutional Amendment 14, Chaplinsky vs. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

Essentially Mr. Anselmo was arrested because he disagreed with a police officer about the officers belief that individuals are required to carry ID. The officer testified that this debate led him to conclude the Mr. Anselmo was "belligerent" that the officer could "see were this was going."

Perhaps officer Cernich saw were this was going. Mr. Anselmo did not.

During that discussion between Mr. Anselmo and Officer Cernich, Dr. Humphrey, a witness to these events, had time to walk-in and out of the Stampede three times, and to smoke four cigarettes. The officer had time to stop Mr. Anselmo, ask for an explanation, obtain identification, radio in the identification information given, call for backup, and have backup arrive.

After all this, suddenly, Officer Cernich testified at trial, while four armed police officers surrounded Mr. Anselmo, who is alone and wearing a Hawaiian shirt and shorts, RP pg. 113, lns. 4-5; pg. 44, lns 10-12; pg. 76, lns 3-5, and not even carrying a wallet, RP pg. 76, lns 6-8, Officer Cernich claims that he suddenly decided that Mr. Anselmo presented such a threat and risk of physical harm to the four armed police officers such as to warrant and subject Mr. Anselmo to what officer Cernich referred to as a pat down frisk for weapons, RP pg. 60, lns. 14-17. After knocking Mr. Anselmo about a bit, he was also charged with resisting arrest and refusing to obey an order to stop

resisting arrest as separate counts. 62 Denver University Law Review 165. Apparently, referring to the President Roosevelt story, officer Cernich had run out of ideas.

V. CONCLUSION

For the foregoing reasons therefore, is respectfully requested that this Court reverse the trial judge's orders (1) denying Mr. Anselmo's counsel of choice; (2) denying Mr. Anselmo's right to trial by jury; (3) concluding that obeying an officers order to stop and identify himself was tantamount to trespassing; (4) supressing all charges and elements of those charges stemming from the illegal detention after the investigatory stop and identification of Mr. Anselmo was confirmed.

Respectfully submitted,

Phillip Ernest Anselmo

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO

Case No. 99 CR 1304 Division 8
OPINION
THE PEOPLE OF THE CITY OF AURORA
BY AND ON BEHALF OF THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff Appellee,

PHILLIP ERNEST ANSELMO, Defendant - Appellant.

THIS MATTER, having come on pursuant to the Defendant-Appelant's, Phillip Ernest Anselmo's ("Anselmo") appeal; and the Court ruling without oral argument upon the record of the lower tribunal and the briefs submitted by Anselmo and The City of Aurora ("The City"), Plaintiff-Appellee, does hereby render the following decision.

I. PROCEDURAL HISTORY

On September 12, 1998, Anselmo was charged with violations ofthe Aurora Municipal Code 94-383 Resisting Arrest' 94-71.~2) Trespass; 94-74(d) Defrauding a

Public Establishment, and 94-110(5) Failure to Obey a Lawful Order. Those charges came on for trial April 12, 1998 before the Honorable Alan C. Stine, Municipal Court. Judge, Division III, City of Aurora, Counties of Adams and Arapahoe, State of Colorado. ~-At the close of the City's case, the court ordered a judgment of acquittal on the charge of Defrauding a Public Establishment. After completion of a half-day trial, the lower court found Anselmo guilty of Resisting Arrest, Trespass, and Failure to obey a Lawful Order. Anselmo raises four distinct issues on appeal. First, Anselmo clams he was denied his right to trial by jury. Second, Anselmo claims he was denied his right to -' counsel of his choice. Third, Anselmo argues his actions which give rise to the trespass conviction were the result of police conduct, and thus, insuff~cient evidences exists as a matter of law to uphold his conviction for trespass. Finally, Anselmo claims he was -. subject to an illegal seizure and thus, the seizure and the fruits of the poisonous tree mustbe suppressed resulting in a lack of evidence to uphold his conviction for trespass,resisting arrest, and failure to obey a lawful order, which the trial court

determined merged with resisting arrest for sentencing purposes.

II. FACTS

On September 12, 1997, Anselmo walked into the Stampede, a country-western dance clUb and failed to pay the posted cover cha.rge. Anselmo may not have asked the club doorperson's permission to enter the club without paying. Regardless, the manager of the Stampede and an Aurora Police Officer, Offcer Cerinich, then contacted Anselmo, asked him to walk with them, and then the two men escorted Anselmo to the front ofthe bar. Anselmo was told to either pay the required $3.00 per person cover charge or leave the establishment. Anselmo refused to pay the cover charge and refused to leave the establishment.

Instead, Anselmo began a discussion with Officer Cerinich regarding whether he was required to carry physical identification on his person. Three other backup officers arrived during this conversation. After a period of time, Officer Cerinich determined that he needed to do a pat-down cursory search of the defendant. In response to the search, Anselmo resisted.

The other officers on the scene aided Officer Cerinich, and thereafter, they advised Anselmo several times that he was Under arrest and ordered him to stop resisting. However, Anselmo continued to resist. The four officers were finally able to control Anselmo and placed him under arrest.

Anselmo sent a letter to the court on September 28, 1998 pleading not guilty waiving his right to formal arraignment, waiving his right to a speedy trial, and requesting a pretrial hearing to be set for November 25, 1998. Anselmo appeared on the next court date and requested a jury trial. The court informed Anselmo that a request for a jury trial must be made in writing and the time to make such a request had passed. Thereafter, the Judge set the matter over for trial on February 16, 1999. -"

Anselmo sent the clerk of the court a notice of jury trial demand and remitted the $25.00 fee when he returned home from the court date. The clerk initially set the matter for jury trial and then vacated the court date, noting the jury demand was

untimely. The original trial court date of February 16, 1999 was then reinstated.

On February 12, 1999, Mr. Tooley, counsel for the defendant entered his appearance on behalf of Anselmo and requested a continuance. The continuance was granted and the case was set for bench trial on April 12, 1999. On March 5, 1999, the defendant renewed his motion for a jury trial. The motion was denied.

On March 31, 1999, the defendant filed a motion for substitution of counsel. The court ordered that counsel could be substituted but would grant no further continuances or otherwise delay the April 12 court date. The case then proceeded to trial with Mr. Tooley as counsel.

Anselmo claimed he was not required to carry physical identifcation papers. Anselmo further claimed that while he was having the conversation with Officer Cerinich, the four officers unjustifiably attacked him. Additionally, the defendant claimed he was subject to an illegal seizure thereafter and was not free to leave. Thus, he was unable to comply with the manager's and Officer's requests that

he leave the building and, therefore, could not be guilty of trespass.

Anselmo raises four issues on appeal. First, Anselmo claims he was denied the right to a jury trial. Second, he claims he was denied the right to counsel of his choice. Third, Anselmo claims there was insuff~cient evidence to convict him of the charge of trespass. Finally, he elaims he was subject to an illegal seizure when he was escorted to the front area of the bar. Therefore, he could not be convicted of trespass, resisting arrest, or failure to obey a lawful order, as these aetions would be deemed fruit of the poisonous tree.

III. RIGHT TO A JURY TRIAL CLAIM

Anselmo argues the lower court denied his right to a jury trial by denying his request on two separate occasions. While the trial court did deny Anselmo a jury trial, this denial was not without justification.

The Supreme Court promulgated the Colorado Municipal Court Rules of Procedure to secure "simplicity in procedure, fairness

in administration, and the elimination of unjustifiable expense and delay." Colo. St. Mun. Ct. P. Rule 202. The rule regarding the procedure to obtain trial by jury was modeled under the same ideals. Under the rule, a trial shall be to the court unless the defendant is constitutionally entitled to a jury trial, "in which case, the defendant shall have a jury, if within 10 days afterarraignment or entry of plea, the defendant files with the court a written jury demand and at the same time tenders to that court a jury fee of $25.00." Colo. St. Mun. Ct. P. Rule t 223 (emphasis added).

Anselmo argues that a right to a jury trial cannot be waived by a defendant for failing to request a jury trial in writing and to do so violates his 6th Amendment right to a trial by jury. However, the Colorado Supreme Court has found that the requirement to request a jUry trial in writing and remit $25.00 does not violate the f.~ Amendment. Christie v. People, 837 P.2d 1237, 1241 (1992).

Anselmo argues that he was unaware and was not advised of the written requirements and thus, could not have made a knowing

and informed waiver. However, as Anselmo is an attorney licensed in the State of Colorado, he is under a duty to know the rules of the court in which the case is to be heard. Rudd v. Rogerson, 152 Colo. 370, 374; 381 P.2d 995, 998 (Colo. 1963).

The fact that Anselmo was pro se at the time he waived advisement and entered his plea is not relevant as a "defendant who elects to act as his own attorney must accept the burdens and hazards that accompany that decision. People v Price, 903 P.2d 1190, 1191 (Colo. App. 1995) Reliford v. People, 195 Colo. 549, 555, 579P.2d 1145, 1149 (1978). Therefore, Anselmo is deemed to know the Municipal Court Rules of Civil Procedure including the rules regarding perfecting his right to a jury trial.

Anselmo's letter to the court waived advisement as well as entered a plea. The period in which to perfect a jury trial was properly determined to be October 8, 1999. Because Anselmo's reqUest was therefore untimely, the denial of a jury trial was proper.

IV. DENIAL OF THE RIGHT TO COUNSEL OF CHOICE CLAIM

Anselmo was arrested on September 12, 1998. He plead not guilty and waived speedy trial protections by letter on September 28 and requested a pretrial conference on November 25, 1998. This setting was outside the normal setting parameters of the court. The defendant's first appearance before the court was at the pretrial conference where Anselmo requested a court date after the holiday. This was also outside the normal setting range of the court. Four days before the February 16, 1999 trial date, Mr. Tooley entered his appearance on behalf of Anselmo and requested a continuance until April 12. Anselmo again waived his speedy trial protections to allow the court to set such a late date.

Less than two weeks before trial, Anselmo filed a Motion for Substitution of Counsel and Request for Continuance. The trial court held it would allow a substitution of counsel but no continuance would be granted. Anselmo elected to continue with previous counsel.

A trial court is vested with broad discretion in granting continuances of trial dates, and will not be reversed absent a showing of a plain and arbitrary abuse of discretion. Armhruster v. Edgan, 731 P.2d 757, 760 (Colo. App. 1987) quoting Catron v. Catron, 40-Colo. App. 476, 479, 577 P.2d 322, 324 (1978).

No abuse of discretion will be found unless the denial is so arbitrary as to deny the accused due process of law. People v. Denton, 757 P.2d 637, 638 (Colo. App. 1988).

The decision as to whether defense counsel should be permitted to withdraw lies within the sound discretion of the court. If the trial court has a reasonable basis for concluding that the attorney-client relationship has not deteriorated to the point at which counsel is unable to give effective assistance in the presentation of a defense, then the court is justified in refusing substitution of counsel. People v. Rocha, 872 P.2d 1285, 1289 (Colo. App. 1993).

In the case at bar, defendant requested a pretrial conference outside the normal

municipal court time frame, an initial trial date outside the normal time frame and outside the speedy trial parameters, and a continuance at the time Mr. Tooley made his entry of appearance. Because the court gave ample time for Anselmo, and later, Mr. Tooley to prepare a defense, granted several continuances to the defendant, and because counsel did present a defense, there is no showing of plain and arbitrary abuse of discretion. Accordingly, this court will not overrule the trial court's ruling denying another continuance.

V. INSUFFICIENCY OF EVIDENCE TO CONVICT FOR TRESPASS CLAIM

Anselmo argues the lower court's finding of guilt for trespass was in error because he was having a diologue with Officer Cerinich regarding the need to produce physical identification. However, the charge of trespass accrued prior to this sequence of events. Anselmo, during his direct testimony, said he volunteered to leave after being asked by Mr. Smith, the bar manager. This evidence was directly contrary to the testimony of both Officer Cerinich and Mr. Smith. Under direct

testimony, both witnesses testified that Anselmo refused to leave the premises after repeated requests.

The trial court judge determined credibility in favor of Officer Cerinich and Mr. Smith. The court found that both Officer Cerinich and Mr. Smith possessed the authority to request Anselmo to leave, did request Anselmo to leave, and that the defendant refused to leave the premises. In determining the credibility of a witness, the trial court is free to consider and give equal weight to both direct and circumstantial evidence. People v.Butchelor, 800 P.2d 59g, 604 (Colo. 1990), quoting People v. Bennet, 183 Colo. 125, 131, 515 P.2d 466, 46g (1973).

It is within the trial court's province to judge the credibility, sufficiency, probative effect, and weight of the evidence, as well as the inferences and conclusions to be drawn from the evidence. People in the interest of M.S.H., 656 P.2d 1294, 1297 (Colo 1983). Therefore, the court will not disturb, on appeal, the factual finding of the lower court sitting without a jury unless the factual findings are clearly erroneous and not supported oy

the record. Gebhardt v. Gebhardt, 198 Colo. 28, 30; 595 P.2d 1048, 1050 (1979.)

Moreover, this court will not disturb the trial court's verdict when, after reviewing the evidence in the light most favorable to the Prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Peoplev. Duniap, 975 P.2d 723, 752 n.28 (Colo 1099), quoting Jackson v. Virginia, 443 U.S. 307, 319; 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

In the case at bar, the trial court judge was free to accept or discount the testimony of the defendant, Off cer Cerinich, and Mr. Smith. It is the province of the trial judge to assess each witness' credibility, judge the probative value of each witness' testimony, and draw conclusions and inferences from that testimony.

Because each of the witnesses were able to contemporaneously testify regarding their recollections as to the events of the night in question, the trial court judge was able to assess each witness' credibility. The trial

court found Officer Cerinich and Mr. Smith to be more credible. The trial court was free to make such a determination. Therefore,this court will not disturb the factual findings of the trial court because those findings are not clearly erroneous, are supported by the record and, as such, a rational trier of fact could have found each and every element of the crime of trespass proven beyond a reasonable doubt.

VI. SUPPRESSION OF SEIZURE AND EVIDENCE CLAIM

Finally, Anselmo argues the lower court erred by failing to suppress evidence including the seizure of the defendant's person and any fruit of that poisonous tree thereafter. The contemporaneous objection rule applies to search and seizure issues and failure to raise the objection at the trial level or to file a motion to suppress is tantamount to a waiver. Brown v. People, 162 Colo. 406, 407; 426 P.2d 764, 765 (1967).

Because neither Anselmo nor his counsel preserved these issues before or during

trial, the argument is not properly before this court.

VII. CONCLUSION

Accordingly, for the foregoing reasons, the decision of the lower court is affirmed.

By THE COURT: Deanna E. Hickman /s